IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-514

DOROTHY ANNETTE ABNEY,
Petitioner,

v.

JAMES HAROLD ABNEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Indiana

RICHARD A. ROGERS
700 King Cole Building
7 North Meridian Street
Indianapolis, Indiana 46204
(317) 638-3411
Attorney for James Harold Abney, Respondent

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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STATEMENT OF THE CASE

Dorothy Annette Abney and James Harold Abney were married on November 27, 1958. (R. p. 2) At the time of trial in the Marion Circuit Court on October 8, 1974, Mr. Abney was 45 years old (R. p. 205) and Mrs. Abney was 39 years old. (R. p. 210) Two children were born as a result of this marriage; Tamara Ruth Abney, age 15 and James Scott Abney, age 12. (R. p. 126, lines 14-16)

At the time of the parties marriage, Mr. Abney was approximately 28 years of age and Mrs. Abney was approximately

22 years of age. He had been in the United States Navy for approximately 10 years. (R. p. 177, line 20) At the time of the marriage, Mrs. Abney was mildly arthritic. (R. p. 161, line 10; p. 164, line 12; p. 188, line 20; p. 191, line 12)

In January 1964, the parties were residing at Key West, Florida. (R. pp. 127, 210) The parties separated in fact on January 18, 1964, after five years of marriage, when *Mrs. Abney, of her own volition, vacated the marital home* at Key West, Florida and took the two children to Tennessee while Mr. Abney was on a cruise with the Navy relative to the "Cuban crisis." (R. p. 127, lines 2-5; p. 128, lines 14-21; p. 210, lines 20-26; p. 228, lines 17-21) The parties have not lived and cohabited together since January 18, 1964. (R. p. 6, lines 6-7; p. 126, lines 2-11; p. 127, lines 2-5; p. 128, lines 14-21; p. 210, lines 15-26) The record is silent as to why she left the marital abode on January 18, 1964.

A careful search of the record fails to disclose the date Mrs. Abney filed her suit in Tennessee, however, a separate maintenance decree was entered in the Probate Court of Davidson County, Tennessee on May 25, 1964—four months after Mrs. Abney had left Mr. Abney. (R. p. 18) That decree ordered Mr. Abney to maintain and support Mrs. Abney and their two minor children until further order, gave Mrs. Abney the care, custody and control of the two minor children until further order, and ordered Mr. Abney to pay $300.00 per month to the clerk of the court for the separate maintenance and support of Mrs. Abney and the two minor children, said payments to be made on or before the 10th day of each month commencing with June 1964 and continuing until further ordered by the Court. (R. p. 18) (p. A-18, Mrs. Abney's brief)

The only other decree of the Probate Court of Davidson County, Tennessee appearing in the record in the case at bar, prior to the filing of the case at bar, was entered on July 21, 1969. It decreed that Mr. Abney's petition for absolute divorce be dismissed, that the alimony and support payments to Mrs. Abney and the two minor children be increased and that Mr. Abney pay $375.00 per month on or before the 10th day of each month beginning July 10, 1969 for support of Mrs. Abney and the minor children, until further orders of the Court, and awarded attorneys fees. (R. pp. 20-21) (p. A-28, Mrs. Abney's brief)

There have been other ancillary proceedings in the Probate Court of Davidson County, Tennessee since the first decree was entered in that Court on May 25, 1964.

At the time of filing his Petition for Dissolution of Marriage in the case at bar on October 8, 1974, the parties had not lived together for almost 11 years. (R. p. 210, lines 20-21)

On October 8, 1974, the husband, James Harold Abney, filed his Petition for Dissolution of Marriage seeking to dissolve his marriage to Dorothy Annette Abney, in the Marion Circuit Court, Cause Number C74-1181, in the State of Indiana (R. pp. 2-3)

Mr. Abney's petition alleged that he had been a resident of Marion County, Indiana for more than six months; that Dorothy Annette Abney resides in Nashville, Tennessee; that the parties were married on November 27, 1958; that the parties were separated on May 25, 1964; that two children were born as a result of the marriage, namely, Tamara Ruth Abney, age 14, and James Scott Abney, age 11, both of whom reside and are domiciled in Nashville, Tennessee; that the wife is not now pregnant; that the ground for dissolution of the marriage is the irretrievable breakdown of the marriage; and that personal property interests have been acquired by Mr. Abney, since the separation of the parties, and that the same should be decreed his sole and separate property. (R. p. 2)

Thereafter, on October 11, 1974, John T. Neighbours, Attorney at Law, Indianapolis, Indiana, entered his general appearance in this cause for Dorothy Annette Abney (R. p. 6).

On October 28, 1974, Dorothy Annette Abney filed a motion to dismiss contending that the court lacked jurisdiction of the subject matter, jurisdiction of the person of Mrs. Abney and improper venue (R. p. 8). On December 13, 1974, Mr. Abney filed a Memorandum In Opposition To Motion To Dismiss of Mrs. Abney (R. pp. 34-37). On January 17, 1975, Judge Endsley overruled the motion to dismiss filed by Mrs. Abney (R. p. 38).

On January 20, 1975, Mrs. Abney filed a Motion for Change of Venue (R. p. 40) and Mr. Abney field a Memorandum In Opposition To Motion For Change Of Venue on January 21, 1975 because Mrs. Abney's Motion for Change of Venue had not been timely filed (R. p. 42). Judge Endsley overruled Mrs. Abney's Motion for Change of Venue and set the cause for trial on February 10, 1975 at 1:30 p.m. (R. p. 43).

On January 24, 1975, Mrs. Abney filed her answer to Mr. Abney's petition in which she asserted that the Marion Circuit Court lacked jurisdiction of the subject matter, the person of Mrs. Abney, and improper venue. No other matters were alleged in the answer. (R. p. 44)

On January 24, 1975, Mrs. Abney filed a motion for continuance, which motion was approved by the trial court and the cause was reset for February 27, 1975. (R. pp. 46-50)

On January 29, 1975, Mrs. Abney filed Interrogatories and a Motion to Reduce Time to Answer Interrogatories. (R. pp. 51-56) The Court entered an Order on Motion to Reduce Time. (R. p. 58)

On February 14, 1975, Mr. Abney filed his answers to Mrs. Abney's interrogatories numbered 1 through 3 and his objections to Mrs. Abney's interrogatories numbered 4 through 24. (R. pp. 60-63)

On February 19, 1975, Mrs. Abney filed a Motion for Continuance of the trial set for February 27, 1975 (R. p. 65) and the Court on that same date entered an order continuing that trial. (R. p. 68)

Thereafter, the trial court overruled Mr. Abney's Objections to Interrogatories filed by Mrs. Abney and ordered Mr. Abney to answer the interrogatories within thirty days. (R. p. 69)

Thereafter, the trial court on February 20, 1975, set this cause for trial on May 15, 1975 to commence at 9:00 a.m. (R. p. 70)

On March 6, 1975, Mr. Abney filed his Answers to Interrogatories numbered 4 through 24. (R. pp. 72-73)

On April 21, 1975, James Harold Abney filed his Interrogatories directed to Mrs. Abney (R. pp. 79-83), his Motion to Produce (R. p. 77), and his Motion to Reduce Time to Answer Interrogatories and for Production of Documents. (R. p. 77) On April 22, 1975, an Order on Motion to Reduce Time was entered by the court. (R. p. 85)

On May 5, 1975, Mrs. Abney filed a Motion to Dismiss (R. p. 87) and the motion was overruled. (R. p. 92)

On May 7, 1975, Mrs. Abney filed her Answer to Petitioner's Interrogatories. (R. pp. 94-108)

On May 15, 1975, prior to trial, Mr. Abney filed a Motion for Judgment on the Pleadings (R. pp. 110-111), the Court heard argument on said motion (R. pp. 116-118), and the Court overruled said motion. (R. pp. 112, 118)

William P. Ortale, Esquire, of Nashville, Tennessee appeared for Mrs. Abney at the trial as co-counsel.

Thereafter, on May 15, 1975, the trial of this cause was commenced, was submitted on the merits, and evidence heard.

(R. pp. 116-246) On May 15, 1975, at the commencement of the trial, Mr. Neighbours stated, if this court is going to continue with its disposition, that it is not going to grant his legal arguments and proceed with the divorce matter, he will want to introduce evidence as to support under the Indiana Code that provides for an incapacitated spouse. (R. p. 117) The Court stated that the court had previously ruled on the questions involved in the matter of whether or not this Court had jurisdiction for the sole purpose of this dissolution of the marriage; that the Indiana law is quite clear that a citizen of this county, this state, who resides here for at least six months and in the county for three months prior to the time that he files the case, is eligible to have his case litigated on the issue of the dissolution of marriage; that the court has taken the position that it is the sole issue upon which it would consider this cause; that the court has taken the position that the matters relating to the real estate, support have been adjudicated and that the Tennessee rulings on that area are and will be given full faith and credit; they would be enforced in this court pursuant to law; that the issue of the dissolution of marriage under our statute is an open question as far as this court is concerned and this Court has so ruled; and that is the sole issue upon which this Court will consider the case; it will not go into the other matters; it will fully enforce the Tennessee decision in regards to property, in regards to custody, in regards to support, and in regards to maintenance. (R. pp. 123-124) At this point petitioner called his first witness, James Harold Abney. (R. p. 125) During the course of Mr. Neighbours' cross-examination of Mr. Abney, Mr. Neighbours stated to the court that Mrs. Abney has appeared in this Court and because she has appeared, she is, if this court is going to deny her legal assertions and proceed with granting a divorce, she is going to ask the court to invoke the Indiana Incapacitated Spouse statute. (R. p. 132, line 26; p. 133, line 5) Mr. Neighbours further stated that by Mrs. Abney's mere appearance in this court she's entitled legally to have this court order a support order under the Indiana Incapacitated Spouse statute; legally if she had not appeared in the State of Indiana all we would be discussing was whether the marriage was irretrievably broken; but now we're discussing the full spector of their marriage and all the ramifications of it due to her appearance. (R. p. 134, lines 11-22) The Court then asked Mr. Neighbours, is it your legal position then that you want to open the entire matter. (R. p. 134, lines 23-25) To that question Mr. Neighbours responded to the Court in the affirmative. (R. p. 134, lines 26 and 27) After more discussion on the record, the Court stated, that he thought Mrs. Abney's position is that by submitting to, by appearing in court, they've submitted themselves to the jurisdiction of the Court and that the Court presumed we're referring to section 31-1-11.5-9 under the dissolution of marriage code, subparagraph C; and if they submit themselves to the jurisdiction of the Court, which is the position that Mr. Neighbours is now taking, then clearly the Court can make any order; I suppose then it's up to the Court to determine whether or not they submitted themselves as a matter of fact or whether or not the question of res judicata applies. (R. p. 135, line 19; p. 136, line 17) After more discussion, the Court stated, Mr. Neighbours says the respondent is submitting herself to the jurisdiction of this Court on the issue of the entire marriage. (R. p. 137, lines 22-25) After further cross-examination by Mr. Neighbours, an argument pursuant to an objection, the Court stated, the parties have submitted themselves to the jurisdiction of the Court so the Court has jurisdiction at this moment; and that the Court understood Mr. Neighbours' position to be that the Court now has jurisdiction over the entire subject matter. (R. p. 142, lines 8-14)

During the course of the trial the parties made two stipulations of fact. First, that Dorothy Annette Abney is suffering from the condition of rheumatoid arthritis and that she is completely disabled and is unable to be gainfully employed. (R. p. 207) The second, that the insurance benefits provided for the dependent wife under the Champus Insurance, which is a

federal government program, will terminate upon the entry of a decree of dissolution. (R. p. 213)

At the conclusion of the trial, the Court took the cause under advisement (R. p. 249) and asked for post trial briefs from counsel.

On June 13, 1975, Mrs. Abney filed her Memorandum Brief and Request for Findings of Fact (R. pp. 251-260) and on June 19, 1975, Mrs. Abney filed her Addendum to Memorandum Brief and Request for Findings of Fact (R. pp. 266-268)

On June 19, 1975, Mr. Abney filed his Post Trial Brief. (R. pp. 270-307) and on July 3, 1975, Mr. Abney filed his Supplemental Post Trial Brief. (R. pp. 309-310)

Thereafter, the Court having taken said matter under advisement, made its findings and judgment. (R. pp. 311-313)

On August 6, 1975, Mrs. Abney filed her Motion to Stay. (R. pp. 318-319) On August 19, 1975, the trial court entered its Order to Stay. (R. p. 320)

On August 26, 1975, Mr. Abney filed his Report to Court advising the Court that he had received the Order to Stay on August 25, 1975 *and that James Harold Abney was married on August 16, 1975.* (R. p. 322)

REASONS FOR DENYING THE WRIT

A

Matters Waived on the Record at Trial May Not Be Raised on Appeal.

Mr. Abney filed his Petition for Dissolution of Marriage in the Marion Circuit Court on October 8, 1974. He sought only the dissolution of his marriage on the ground of irretrievable breakdown and that he be awarded personal property now in his possession. He sought no other relief. (R. p. 2)

This cause came on for trial on May 15, 1975. It was Judge Endsley's express intention to hear evidence only on those two issues. The following dialogue was had at the trial:

[During argument on Motion for Judgment on the Pleadings]

The Court: . . . There was a Motion for Judgment on the Pleadings filed this morning. Did you want to be heard on that?

Mr. Rogers: . . . We are here simply for a dissolution of marriage as I construe the pleadings . . .

Mr. Neighbors [sic]: . . . Additionally, if this Court is going to continue with its disposition, that it is not going to grant our legal arguments and proceed with the divorce matter, we will want to introduce evidence as to support under the Indiana Code, statute that provides for an incapacitated spouse . . . (R. p. 116, line 14—p. 117, line 18)

Mr. Rogers: . . . as to the matter of support and custody of the children. I won't argue that point, that's already been finally tried and decided by the Tennessee Court. But, it's not res judicata as to the dissolution of this

marriage. The only time that was raised, the subject went to the original separation decree in Tennessee, it was thrown out as a ruling on a demurrer or a motion to dismiss because grounds weren't stated in the pleading filed by Mr. Abney. The issue of this marriage as to whether it should be finally dissolved has never been tried on the merits by any court, to my knowledge, in any jurisdiction in the United States. And that issue is the sole remaining one to be tried this morning. All other matters as far as support, property settlement, custody of the children have all been decided by the Tennessee Court. The only one remaining for trial anywhere with regard to the marriage of these parties is whether or not the marriage should be finally dissolved. Thank you, Your Honor.

The Court: The Court has previously ruled on the questions involved in the matter of whether or not this Court has jurisdiction for the *sole purpose of this dissolution of the marriage*. The Indiana law is quite clear that a citizen of this county, this state, who resides here for at least six months and in the county for three months prior to the time that he files the case, is eligible to have his case litigated on the issue of the dissolution of marriage. *The Court has taken the position that is the sole issue upon which it would consider this cause.* It has taken the position that the matters relating to the real estate, support have been adjudicated and that the Tennessee rulings on that area are and will be given full faith and credit. They would be enforced in this court pursuant to law. *The issue of the dissolution of marriage under our statute is an open question as far as this Court is concerned and this Court has so ruled. And I again reiterate that is the ruling is the sole issue upon which this Court will consider the case.* It will not go into the other matters. It will fully enforce the Tennessee decision in regards to property, in regards to custody, in regards to support, and in regards to maintenance . . . (Emphasis added.) (R. p. 122, line 23—p. 124, line 24)

[During the cross-examination of Mr. Abney by Mr. Neighbours:]

Mr. Neighbors: Your Honor, Mrs. Abney has appeared in this Court and because she has appeared, she is, if this court is going to deny her legal assertions and proceed with granting a divorce, she is going to ask the court to invoke the Indiana incapacitated spouse statute. Therefore it's very pertinent to this matter whether Mr. Abney has provided for the children in the past, provided for Mrs. Abney in the past to reflect what their needs will be in the future . . .

Mr. Rogers: I would not, Your Honor, propose that you don't have jurisdiction to hear that when it's raised properly. But we're here on a verified petition for dissolution of marriage. Another court has jurisdiction of all other matters besides the statis [sic] of the marriage. If they come in here with a petition under another statute then that's the way they have to do it. . . . The only thing we can adjudicate this morning is what's before the Court which is a dissolution of the marriage.

Mr. Neighbors: Your Honor, if I may, by her mere appearance in this court she's entitled legally to have this court order a support order under the Indiana statute, the incapacitated spouse statute. Legally if she had not appeared in the State of Indiana then what Mr. Rogers says is true. And all we would be discussing was whether the marriage was irretrievably broken down. *But now we're discussing the full*

specter of their marriage and all the ramifications of it due to her appearance. (Emphasis added.)

The Court: *Is it your legal position then that you want to open up the entire matter?* (Emphasis added.)

Mr. Neighbors: *Yes, Your Honor, it is and that's evidenced by her appearance here . . .* (Emphasis added.)

The Court: I think their position is that by submitting to, by appearing in court, they've submitted themselves to the jurisdiction of the court and I presume we're referring to section 31-1-11.5-9 under the dissolution of marriage code, . . . And if they submit themselves to the jurisdiction of the court, which is the position that Mr. Neighbours is now taking, then clearly the court can make any order . . .

Mr. Rogers: . . . My point being that that issue has been tried. Her incapacity has been tried. It's been determined in Tennessee. She is incapacitated under the court decree in Tennessee. So, the only issue we have this morning, if you take our statute, everything in that statute has been decided in Tennessee except whether or not he's entitled to a final dissolution of marriage. . . .

The Court: . . . And Mr. Neighbours says the respondent is submitting herself to the jurisdiction of this court on the issue of the entire marriage, apparently. . . . (R. p. 132, line 26—p. 137, line 25)

The Court: No, the parties have submitted themselves to the jurisdiction of the court so the court has jurisdiction at this moment. As I understand Mr. Neighbours' position, the court now has jurisdiction over the entire subject matter by——

Mr. Rogers: That's always been his position, so I think the court understands his position. (R. p. 142, lines 8-17)

It is clear from the above dialogue, that Mrs. Abney, during the trial, had waived on the record any right to complain on appeal that the trial court failed to give full faith and credit to the Tennessee decrees, that the court failed to recognize the doctrine of comity, that Mr. Abney was barred from proceeding in this instant case at bar and any and all other matters raised by Mrs. Abney's motion to correct errors except, an abuse of discretion. Best v. State (1975), — Ind. App. —, 339 N.E.2d 82.

In addition, by application of Trial Rule 8(D), Indiana Rules of Trial Procedure, which provides:

> **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, except those pertaining to amount of damages, are admitted when not denied in the responsive pleading.

Mrs. Abney has admitted that the marriage is irretrievably broken and that property acquired after the separation and located in Indiana should be awarded to Mr. Abney. No part of the allegations of her answer were directed to Mr. Abney's complaint. (R. p. 44) By this admission Mrs. Abney cannot complain that her marriage was dissolved.

B

The Trial Court Gave Full Faith and Credit to Those Portions of the Decrees of the Tennessee Court Entitled Thereto, and Declined to Give Full Faith and Credit to Those Portions of the Decrees of the Tennessee Court Not Entitled to Full Faith and Credit. Mr. Abney Was Not Barred From Proceeding to Dissolve His Marriage in the Marion Circuit Court by That Court's Failure to Give the Decrees of the Tennessee Court Full Faith and Credit. While the Tennessee Court May Have Had Continuing Jurisdiction of the Marriage of the Parties, It Did Not Have Exclusive Jurisdiction of the Marriage, and There Is No Language in the Decrees of the Tennessee Court, Prior to the Filing of Mr. Abney's Petition for Dissolution of Marriage in the Marion Circuit Court, Expressly Retaining or Reserving in the Tennessee Court Jurisdiction of the Marriage of the Parties.

Prior to Mr. Abney's filing of his petition for dissolution of marriage in the Marion Circuit Court there were two decrees of the Probate Court of Davidson County, Tennessee, which are of record in the case at bar.

The first decree of the Probate Court of Davidson County, Tennessee appears on page 18 of the transcript and appendix C, p. A-18 of Mrs. Abney's brief.

This decree was entered May 25, 1964. There is no language in this decree expressly stating that that court has continuous jurisdiction of the parties and/or the subject matter, nor is there any express language which excludes any other court from exercising its jurisdiction, nor is there any express language reserving exclusive jurisdiction of the marriage or the parties or the children exclusively in that court, nor is there any language expressly retaining jurisdiction of that cause in that court. The verbage ". . . until further order of the court" is used twice and the verbage ". . . continuing until further order of the Court" is

used once. This verbage simply refers to the duration of that court's orders.

The second decree of the Probate Court of Davidson County, Tennessee, appearing of record in this cause, was entered on July 21, 1969, and appears in the transcript at page 20 through 21, and appendix E, p. A-28 of Mrs. Abney's brief. The verbage ". . . until further orders of this court" is found in that decree in only one place, on page 21 of the transcript and p. A-29, appendix E. It merely refers to the duration that Mr. Abney is to pay the support order. Nowhere in that decree does the Tennessee court expressly retain or reserve in that court exclusive jurisdiction of the marriage of the parties, nor does the court expressly say that it has continuing jurisdiction to the exclusion of any other court.

The first Tennessee decree, referred to above, ordered, adjudged and decreed that Mr. Abney maintain and support Mrs. Abney and their two children separately, that Mrs. Abney have the care, custody and control of the minor children, and ordered Mr. Abney to pay $300.00 per month for the separate maintenance and support of Mrs. Abney and the two minor children.

The second decree of the Tennessee Court, referred to above, denied Mr. Abney's petition for absolute divorce, increased the support payments to Mrs. Abney and the two minor children to $375.00 per month and awarded attorneys fees.

On October 8, 1974 Mr. Abney filed his petition for dissolution of marriage in Marion County, Indiana, which appears on page 2 of the transcript, and reads, omitting its formal parts, as follows:

> Comes now the petitioner, James Harold Abney, and for his cause of action for dissolution of marriage, says:
>
> 1. That the petitioner, James Harold Abney, resides at 8828 Elmonte Drive, Indianapolis, Marion County, Indi-

ana, and has been a resident of Marion County, Indiana for more than 6 months.

2. That the wife, Dorothy Annette Abney, resides at 128 Tallwood Drive, Nashville, Tennessee.

3. That the parties were married on November 27, 1958.

4. That the parties were separated on May 25, 1964.

5. That there were born as a result of this marriage 2 children, namely, Tamara Ruth Abney, age 14, and James Scott Abney, age 11, both of which children are residing in and domiciled in Nashville, Tennessee.

6. That to the best of your petitioner's knowledge the wife is not now pregnant.

7. That the ground for dissolution of marriage is the irretrievable breakdown of the marriage.

8. That personal property interests have been acquired by your petitioner, since the separation of the parties, and the same should be decreed to be his sole and separate property.

WHEREFORE, petitioner prays that the marriage of the parties be dissolved, that property now in his possession be decreed his sole and separate property, and for all other just and proper relief in the premises.

Mr. Abney simply sought a dissolution of his marriage and to be awarded personal property which was acquired after the separation. It should be noted that the separation date alleged in rhetorical paragraph 4 of his petition is the same date as the initial Tennessee court decree. Mr. Abney has maintained throughout this case that the Tennessee court orders were entitled to full faith and credit. From the dialogue which appears under Topic A in this brief, it is clear that Judge Endsley, up to the trial of this cause, was of the same opinion. It was Mr. Abney's position and Judge Endsley's position that

while the Tennessee court had continuing jurisdiction over the custody of the children, the support of the children, any disposition of property made by the Tennessee court, and the maintenance of Mrs. Abney were entitled to full faith and credit; but that the Marion Circuit Court had concurrent jurisdiction with regard to the final termination of the marriage of the parties. Estin v. Estin, (1948) 334 U.S. 541, 92 LEd. 1561; Kniffen v. Courtney, (1971) 148 Ind. App. 358, 266 N.E.2d 72. If Mr. Abney could have petitioned for an absolute divorce in Tennessee, he could petition for an absolute divorce or dissolution of his marriage in Indiana. Estin v. Estin, (1948) 334 U.S. 541, 92 LEd. 1561; Kniffen v. Courtney, (1971) 148 Ind. App. 358, 226 N.E.2d 72.

Mrs. Abney concedes that Tennessee law provides:

> . . . in Tennessee under their statute, once two years has elapsed from the granting of the separate maintenance, either spouse may, upon a showing parties have not reconciled, petition for absolute divorce. (R. p. 120, lines 22-27)

The Marion Circuit Court, following the *Estin* and *Kniffen* cases, Ibid, entered a decree in the case at bar on July 29, 1975, which decree appears in appendix H of Mrs. Abney's brief, p. A-43.

It is clear that the two decrees of the Tennessee court were not final judgments with regard to the final dissolution of the marriage relationship and the maintenance award of Mrs. Abney. Those portions of the Tennessee decrees were not entitled to full faith and credit under the Constitution of the United States. Judge Endsley gave the two decrees of the Tennessee court full faith and credit as regards its prior orders for support, found an arrearage in that support, and gave Mrs. Abney a judgment against Mr. Abney for the arrearage. Judge Endsley, in his decree further recognizing and giving full faith and credit to the Tennessee decrees, specifically stated in his de-

cree: ". . . in addition to the *valid Tennessee order* of $375.00 per month, he is ordered to pay respondent [Mrs. Abney] $125.00 per month beginning August 1, 1975 and on the first of each month thereafter during respondent's incapacity for the maintenance of respondent." [Emphasis added.]

It is also clear, that Mr. Abney was not barred from proceeding to dissolve his marriage in the Marion Circuit Court by that court's failure to give the decrees of the Tennessee court full faith and credit. Under the foregoing authorities the restraining order emanating from the Tennessee court was not a final judgment entitled to full faith and credit.

C

To the Extent That It Was Applicable, the Trial Court Applied the Doctrine of Comity. Mr. Abney Didn't Come to Indiana to Escape the Tennessee Orders. He Sought From the Marion Circuit Court Only Two Things. First, the Dissolution of the Marriage to Mrs. Abney. Second, That Personal Property Which He Acquired After the Separation of the Parties and After His Return to His Indiana Domicile and Located in Indiana, Be Awarded to Him. Mr. Abney's Position Has Consistently Been That the Orders and Decrees of the Tennessee Court as to Support and Maintenance, Custody, and Disposition of the Property Rights of the Parties, Prior to His Filing This Action, Are Entitled to Full Faith and Credit. And That He Is Bound by Those Determinations and Orders. The Marion Circuit Court Should Not Have Refused to Entertain This Cause for the Dissolution of the Abney Marriage. Mr. Abney Is a Citizen of This State, Is Domiciled Here, the Marion Circuit Court Has Jurisdiction of the Subject Matter, and It Is the Natural Forum for Mr. Abney to Seek a Dissolution of His Marriage.

Much of the argument of Mr. Abney in Topic B of this brief is applicable to the instant argument and is incorporated here by reference.

Kniffen v. Courtney, (1971) 148 Ind. App. 358, 266 N.E. 2d 72, at page 75 holds:

> However, the Courts of Indiana are not obligated to give the decree any further effect than is the state rendering the decree. Thus those portions of the decree *which are not final*, i.e., custody and support fall within the doctrine of comity and if valid in the state granting the divorce are valid in every other state. (Emphasis added.)

And at page 76, the Court went on to say:

> It appears on the face of appellant's complaint that the Court of Kentucky has the power to modify the support order; therefore, the courts of Indiana may modify the support order if conditions presented to the Court warrant such action.

As discussed under the proceding section of argument in this brief, the Tennessee court could have granted an absolute divorce upon the petition of either Mr. or Mrs. Abney. On the basis of the foregoing authority the Marion Circuit Court, upon petition of either Mr. or Mrs. Abney could dissolve this marriage.

The Marion Circuit Court, having found an irretrievable breakdown of the marriage, dissolved the marriage. The Marion Circuit Court recognized the doctrine of comity in its decree when it granted a money judgment in favor of Mrs. Abney against Mr. Abney for $10,390.00 for past due support and maintenance payments as ordered by the Tennessee court and when it ordered an increase of $125.00 per month over the valid Tennessee order for $375.00 per month.

Mr. Abney did not come to Indiana to escape the Tennessee orders. Nowhere in this record is there any evidence whatsoever that Mr. Abney ever lived in the State of Tennessee. There is no evidence in this record of any escape. There is nothing in

this record that shows that Mr. Abney at any time tried to escape from the Tennessee orders. Mrs. Abney in her brief when stating that Mr. Abney came to Indiana to escape the Tennessee orders makes no citation to the record of where such fact can be found.

Nowhere in this record does Mrs. Abney cite nor can it be found where Mr. Abney has sought to have any decrees or orders emanating from the State of Tennessee declared invalid or unenforceable.

All that Mr. Abney has sought in the way of relief by filing his petition for dissolution of the marriage is that his marriage be dissolved and that after acquired property be awarded to him. (R. p. 2) Mr. Abney's position has consistently been that the orders and decrees of the Tennessee court as to support and maintenance, custody, and disposition of the property rights of the parties, prior to his filing this action, are entitled to full faith and credit and/or that he is bound by those determinations and orders. (R. p. 36, last sentence; p. 37, first sentence; p. 122, lines 22-23, line 21; p. 129, lines 6-10; p. 130, lines 7-9; p. 132, lines 18-25; p. 133, line 24; p. 134, line 4; p. 135, lines 4-8; p. 137, lines 14-15; p. 143, lines 20-23; p. 283-287)

The Marion Circuit Court should not have refused to entertain this cause for the dissolution of the Abney marriage. Mr. Abney is a citizen of Indiana, is domiciled there, the Marion Circuit Court has jurisdiction of the subject matter, and it is the natural forum for Mr. Abney to seek a dissolution of his marriage. The record is silent of any facts refuting the foregoing statement and Mrs. Abney cites no authority to the contrary.

D

The Marion Circuit Court Does Not Have Inherent Equitable Discretion, After Finding an Irretrievable Breakdown of the Marriage, to Deny a Dissolution of the Marriage. To Do So Would Be Contrary to Statutory Law and the Express Mandate of the Legislature. However, Even if the Marion Circuit Court Did Have Such Discretion, There Was No Abuse of Discretion.

IC 1971, § 31-1-11.5-3 provides in part:

> There shall be the following causes of action: (a) dissolution of marriage *which shall be decreed* upon a finding by a court of one of the following grounds, and no other: (1) Irretrievable breakdown of the marriage. . . . [Emphasis added.]

The above quoted provision uses mandatory words to the effect that, after the Court finds that there has been an irretrievable breakdown, the Court has no discretion but to decree the dissolution of the marriage. This conclusion is support in IC 1971, § 31-1-11.5-8 which provides in pertinent part:

> . . . Upon the final hearing: the court shall hear evidence and if it finds that the material allegations of the petition are true, either enter a dissolution decree . . . or if the court finds that there is a reasonable possibility of reconciliation, the court may continue the matter . . .

The court has a choice of two alternatives, i.e., to either enter a decree dissolving the marriage or, if there is a reasonable possibility of reconciliation, to continue the matter for reconciliation. No other choice is given. The Court only has discretion to deny the dissolution only where it has found there is a possibility of reconciliation. It has no discretion to deny the dissolution where it has found that there is an irretrievable breakdown of the marriage. Riley v. Riley (1972), 271 So.2d 181, 183-4. Further support for this conclusion is found in IC 1971, § 31-1-11.5-9, which reads in pertinent part:

> In an action pursuant to section 3 (a) [subsection (a) of 31-1-11.5-3] when the Court has made the findings required by section 8 (a) [subsection (a) of 31-1-11.5-8], the Court *shall enter a dissolution decree* . . . [Emphasis added.]

Again the same mandatory words are used. Once the court has made the finding that there has been an irretrievable breakdown, there seems to be no discretion but to enter the decree of dissolution.

Nowhere in the record of this case does Mrs. Abney deny, question or challenge that the marriage has been irretrievably broken or that there is even the remotest possibility of a reconciliation of these parties.

Prolonging a defunct marriage is not one of the stated purposes of the Indiana dissolution of marriage act.

> While the power of the State should be exerted to preserve the marriage if it can be preserved, it should not perpetuate a legal relationship which has or will cease to exist in fact. Riley v. Riley (1972), 271 So.2d 181, 184.

It is the opinion of Mr. Abney that when the court made a finding that there was an irretrievable breakdown of this marriage, the court had no discretion but to grant a dissolution of the marriage.

However, even if the Marion Circuit Court did have such discretion, there was no abuse of discretion in the court dissolving this marriage and failing to deny the dissolution.

Mr. and Mrs. Abney were married on November 27, 1958. (R. p. 2) The parties separated in fact on January 18, 1964, after five years of marriage, when Mrs. Abney *voluntarily vacated* the marital home at Key West, Florida and took the two children of the parties to Tennessee while Mr. Abney was on a cruise with the Navy. (R. p. 227, lines 2-5; p. 128, lines 14-21;

p. 210, lines 20-26; p. 28, lines 17-21) The parties have not lived and cohabited together since January 18, 1964. (R. p. 6, lines 6-7; p. 126, lines 2-11; p. 127, lines 2-5; p. 128, lines 14-21; p. 210, lines 15-26) The record is silent as to why Mrs. Abney left the marital abode on January 18, 1964. Mr. Abney testified that there was no chance his marriage could be reconciled and he had no intent whatsoever to live with Dorothy Annette Abney at any time ever again in the future. (R. p. 177, lines 23-27) The parties have not lived together for almost eleven years. (R. p. 210, lines 20-21)

It would have defied all rationality for the court to have perpetuated this marital relationship. The decision of the trial court comes to this Court clothed with the presumption that a correct result was reached and the burden is upon Mrs. Abney to overcome that presumption. Echterling v. Jack Gray Transport Inc. (1971), 148 Ind. App. 415, 267 N.E.2d 198. Mrs. Abney has not met this burden. She has come forth with no facts showing that this marriage is not irretrievably broken.

E

Logically, It Does Not Necessarily Follow That if the Trial Court Had No Inherent Equitable Discretion to Deny the Dissolution of Marriage After a Finding of Irretrievable Breakdown, That the Indiana Dissolution Statute Is Unconstitutional on Its Face, or That the Court Was Not Required to and Did Not Consider All of the Incidents of the Marriage. The Trial Court Considered the Incidents of the Marriage in Finding an Irretrievable Breakdown of the Marriage and in Making Orders in Addition to the Valid Tennessee Orders and Decrees—Due Process Is Not Violated—Marital Status and Medical Benefits Are Not Property Rights.

Judge Endsley had equitable discretion in determining whether or not there had been an irretrievable breakdown of the mar-

riage. In exercising this discretion he was able to and did consider all of the incidents of the marriage. In fact, his decree encompasses all incidents of the marriage. The evidence in this cause, over the objections continuously of Mr. Abney, considered all incidents of the marriage. Mrs. Abney in her brief fails to point out anything in the record incidental to this marriage that was not considered by the submission of this cause on May 15, 1975. Mrs. Abney was permitted during the trial to submit evidence as to all incidents of the marriage from the date of the marriage, and even prior thereto, right up to the day of trial. If Judge Endsley did not have discretion to inquire into all aspects and incidents of this marriage, and in fact did not do so, Mrs. Abney is free to point out in her reply brief, what particular aspects and incidents of this marriage were not considered by Judge Endsley and upon which no evidence was submitted, or an aspect of the marriage which Judge Endsley refused to hear. It seems to Mr. Abney that Judge Endsley went far and beyond the narrow issue submitted for trial, at Mrs. Abney's request, and heard all evidence which Mrs. Abney desired to bring forth.

It escapes all logic, for Mrs. Abney to put forth the argument that Judge Endsley had no discretion in determining whether or not the marriage had suffered an irretrievable breakdown.

Once there is a finding that the marriage is irretrievably broken, it hardly seems logical, to deny a dissolution of the marriage and perpetuate a hopeless relationship. Riley v. Riley (1972), 271 So.2d 181, 184; Ryan v. Ryan (1973), 277 So.2d 266.

In any event, there was no abuse of discretion, and there was no denial of due process with regard to any property rights of Mrs. Abney in the medical benefits provided by the United States government through or because of Mr. Abney's military service or social security benefits which may be available to Mrs. Abney in the future.

These matters are not property rights. They were not Mrs. Abney's property. *Veterans benefits are gratuities and establish no vested rights in the recipient.* Taylor v. United States (1974) 379 F. Supp. 642.

As between a husband and wife, there is no constitutional provision protecting marriage itself from legislative control, by general law, upon such terms as public policy may dictate; sovereign power may, by general enactment, regulate and mold their relative rights at pleasure. Flora v. Flora (1975), — Ind. App. —, 337 NE2d 846, rehearing den. A dissolution of marriage law abolishing former grounds for divorce and providing as a ground for dissolution that the marriage is irretrievaby broken does not impair the marriage contract *nor adversely affect property rights of the parties.* Ryan v. Ryan (1973), — Fla. —, 277 So.2d 266. Marriage is not a contract within the constitutional provision prohibiting impairment by the states of the obligation of contract; thus rights growing out of the marriage relationship may be modified or abolished without violating provisions of Federal or State Constitutions which forbid taking of life, liberty, or property without due process of law. Marital rights are inchoate or contingent and may be taken away by legislation before they vest; thus any adverse effect on a wife's social security, pension rights, inheritance rights and right in the marital status itself after granting a separation judgment or decree does not offend due process or equal protection. Gleason v. Gleason (1970), 308 N.Y.S.2d 347, 26 N.Y.2d 28, 256 N.E. 2d 513.

Due process is basically met upon a provision for notice and an opportunity to be heard. Ryan v. Ryan (1973), — Fla. —, 277 So.2d 266.

It must be remembered that Mrs. Abney voluntarily left Mr. Abney on January 18, 1964. The parties had only been married at that time for five years. The parties have lived apart for approximately eleven years. Mrs. Abney, if she deems her social

security or medical benefits through her husband as property rights, voluntarily put these matters in jeopardy when she left her husband in Florida in 1964 and filed her action in Tennessee.

Mr. Abney did not have his pension at the time that Mrs. Abney voluntarily left him; it was not vested then, if it ever vests. If anything, this pension is merely an *earned gratuity* by virtue of Mr. Abney's military service. It is not a "right" which he has. It is wholly dependent upon the whim of Congress. It is not property; it is not a property right. It can be terminated by the Congress at the will of the Congress, increased, decreased or terminated altogether, as was recently done with some of the benefits under the G. I. Bill of Rights. It is not an asset that can be sold, transferred, conveyed or assigned or otherwise alienated or encumbered. It is akin to a dower right or a courtesy right. Ryan v. Ryan (1973), 277 So. 2d 266. The same is true regarding medical benefits.

In addition it appears that Mrs. Abney received all of the property of the marriage at the time of the separation in Key West, Florida from the Tennessee court. Mr. Abney has only acquired property in Indiana after the separation.

The decision of the trial court comes to this Court clothed with the presumption that a correct result was reached and the burden is upon appellant to overcome that presumption. Echterling v. Jack Gray Transport, Inc. (1971), 148 Ind. App. 415, 267 N.E. 2d 198. It is only the abuse of discretion which is reviewable on appeal and the presumption in favor of the correct action of the trial court is one of the strongest presumptions applicable to the consideration of a case on appeal. Shula v. Shula (1956), 235 Ind. 210, 132 N.E.2d 612; Cox v. Cox (1975), — Ind. App. —, 322 N.E.2d 395.

Petitioner fails to cite any authority that medical benefits derived from a career in the military service or future social security benefits are property rights. They, in fact and in law, are not. Taylor v. United States (1974), 379 F. Supp. 642.

CONCLUSION

Mr. Abney submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Richard A. Rogers

RICHARD A. ROGERS
700 King Cole Building
7 North Meridian Street
Indianapolis, Indiana 46204
(317) 638-3411
Attorney for Respondent

Certificate of Service

I hereby certify that I have served a copy of the foregoing brief upon John W. Kelley and William P. Ortale, ORTALE, KELLEY, HERBERT & CRAWFORD, Attorneys at Law, 23rd Floor, Life & Casualty Tower, Nashville, Tennessee 37219, this 6th day of December, 1978, by mailing a copy thereof by United States Mail.

Richard A. Rogers

Richard A. Rogers